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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-249

LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY ELECTRIC, INC., on its own behalf and on behalf of CITY-MANSON-OSBERG, a Joint Venture composed of City Electric, Inc., Manson Construction & Engineering Co., and Osberg Construction Co.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Petitioner fails to mention that after the Court of Appeals issued its decision, Petitioner filed a Petition for Rehearing and, in the alternative, requested a hearing en banc. The Court of Appeals issued an order on July 10, 1975, denying the Petition for Rehearing and declining to

consider the suggestion of rehearing en banc "for failure of the petition to comply with the provisions of Rule 12 of the rules of this court." A copy of this order appears in Appendix A hereto. The opinion of the Court of Appeals and the order of the District Court appear in Appendices A and B to the Petition.

JURISDICTION

Except for the omission of any reference to the Petition for Rehearing and the denial of that petition, the jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Petitioner is entitled to contest the granting of summary judgment when, at the hearing in the District Court, the Petitioner did not oppose the motion on the merits, but merely requested a stay of the Court's ruling and then did not appeal from the denial of the requested stay.

2. Whether the Petitioner can contest summary judgment by raising for the first time after summary judgment was granted a new and unrelated issue and, nearly a month later, attempt to create a factual dispute concerning the late raised issue.

3. Whether the Court of Appeals properly affirmed the District Court's judgment (1) that a portion of an arbitration decision was valid while another portion of the same decision exceeded the arbitrator's authority, and (2) that the Petitioner could not proceed under a separate and independent portion of its collective bargaining agreement

to litigate the questions concerning the arbitrator's decision.[1]

STATUTE INVOLVED

The pertinent portion of the National Labor Relations Act, as amended, 29 USC § 185(a), is set forth in the Petition at pages 2-3.

STATEMENT

This action involves whether a handful of employees performing work on a specific construction project in Grand Coulee, Washington, were entitled, under the terms of their collective bargaining agreement, to a per diem payment for mileage and room and board expenses. The action was instituted in the United States District Court for the Western District of Washington by the Respondent on its own behalf and on behalf of a joint venture. For ease of reference, the Respondent and the joint venture will be referred to hereinafter as the "Company."

In the fall of 1971, the Company was awarded a contract to perform some construction work in Grand Coulee.[2] A portion of the work under this contract was covered by a collective bargaining agreement (the "Agreement") between the Company and the Petitioner (the "Union").

1. The Union, in its Petition before this Court, does not list the second portion of this issue as a question presented, but nevertheless argues it in the Petition. Pursuant to Rule 23(1)(c), this question should be disregarded by the Court. *See Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 324-25 (1972); *United States v. Penn Foundry & Mfg. Co.*, 337 U.S. 198, 205, fn. 1 (1949); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-79 (1938).

2. The facts stated herein, unless otherwise noted, are contained in the uncontraverted affidavit of Richard C. Sweezey, filed by the Company in support of its motion for summary judgment. R. 25-33.

Article V of the Agreement governed the designation of a "job headquarters" for a particular project. If the location of the work being performed under the Agreement satisfied the definition of a "job headquarters," the Company was not required to pay the Union workmen for their travel to and from the job site or their board and room costs. See Section 5.5(b) of the Agreement.[3] Section 5.3 defines "job headquarters" as:

> "Any location within the area of this Agreement which may be designated by the Contractor as headquarters for any job. It shall be at a place where accomodations are sufficient within a 5 mile radius from such Job Headquarters to provide suitable board and lodging for all workmen reporting to such Job Headquarters."

The Company calculated its bid for the work on the assumption that Grand Coulee would be a proper job headquarters and that therefore no per diem allowance would be payable to its employees.

Section 5.1, establishing the procedure for resolving a job headquarters issue, provides as follows:

> "PRE-JOB CONFERENCES (not Pre-Bid Conferences). Prior to the start of any job, a Pre-Job Conference shall be held with the Local Union having jurisdiction. The results of such Conference shall be reduced to writing and shall be binding on all parties.
>
> "Should the Contractor and the Union be unable to agree upon towns to be designated as Job Headquarters and locations to be agreed upon as Reporting Headquarters, they shall refer the matter to the Labor-Management Committee, which shall meet within twenty-four (24) hours to render a decision which will be final and binding.

3. Subsequent references to "Article " or "Section " are to the provisions of the Agreement unless otherwise identified. The Agreement is attached as Exhibit A to the Complaint.

> "If the Labor-Management Committee cannot agree the matter shall be referred to Arbitration, under Rules and Procedures adopted by the parties to the Agreement."

Pursuant to Section 5.1, the Company met on April 26, 1972, with representatives of the Union in a "Pre-Job Conference" to seek agreement that Grand Coulee could be designated as the job headquarters for the project. The Union refused to agree. Instead, the Union referred the matter to the Labor-Management Committee for their consideration under Section 5.1.

The Labor-Management Committee, composed equally of union and employer representatives (see Section 1.5), met May 17, 1972, but could not reach agreement on whether the site could properly be designated as a job headquarters.

Section 5.1 provides that, when the Labor-Management Committee cannot agree, "the matter shall be referred to Arbitration, under Rules and Procedures adopted by the parties to the Agreement." Section 10 of the "Rules and Procedures for Arbitration under Section 5.1" adopted by the parties (Exhibit B to the Complaint) provides as follows:

> "The decision of the Arbitrator shall be rendered on the merits of the facts in accordance with the working Agreement and shall be final and binding upon both parties."

On May 19, 1972, an arbitration hearing was held before the Reverend Doctor W. J. McGettigan (the "Arbitrator"), who issued a detailed written decision (Exhibit C to the Complaint). For ease of consideration, this decision is re-

produced as Appendix B to this Brief, pp. B-1 through B-10.

After an extensive review of the available lodgings, the Arbitrator decided (1) that Grand Coulee satisfied the contractual requirements for a job headquarters if not more than twenty-two Union workmen were employed by the Company on the job at any one time; and (2) that, notwithstanding this finding, the parties should negotiate over whether some sort of per diem should be paid by the Company to the Union workmen.

The Union refused to acknowledge that the Arbitrator's decision as to the status of Grand Coulee as a job headquarters was final and binding upon it. Moreover, on June 1, 1972, the Union by letter requested a meeting of the Labor-Management Committee in order to submit "the issue below . . . for resolution under the dispute procedure used by the parties";

> "At issue: It is the Union's contention that the contractor has failed on two counts to abide by a decision rendered through the arbitration procedure.
>
> "1. (Re: page 7—May 19, 1972—McGettigan) 'This matter is referred to City Manson Osberg and Union #77, IBEW for *negotiation*" (emphasis added).
>
> "2. Contention by the contractor that 'maximum of 22 men employed on the project' (page 6) means only those referred by L.U. #77." (Attachment 1 to Sweezey's affidavit, R. 30)

The Labor-Management Committee met on June 5, 1972, to consider this issue. The Company appeared at that meeting and advised all parties that the "issue" did not come within the provisions of Section 1.4 so as to be within the jurisdiction of the Labor-Management Committee. The Union stated that it was proceeding under

Article V, despite its reference in its June 1 letter to the "dispute procedure." (P. 2 of Attachment 2 to Mr. Sweezey's affidavit, R. 32.)

The Labor-Management Committee did consider the issue but could not reach agreement on it (Attachment 2 to Mr. Sweezy's affidavit, R. 31-33). The Union then, purporting to use Section 1.7, referred the "issue" to the "Council on Industrial Relations for Electrical Construction Industry of the United States and Canada" (the "CIR").

After the June 5 meeting, the Union refused to refer additional workmen to the Company for work on the Grand Coulee job, and, in order to obtain the necessary workmen, the Company exercised its right to hire additional men without using the union referral provisions of the Agreement. When the Company did this, a majority of the Union workmen walked off the job in violation of the Agreement. The Company filed a grievance under Article I protesting the Union's actions.

The CIR sustained the Company's grievance (Exhibit D to the Complaint) but in considering the Union's "issue" directed the Company and the Union to negotiate "to conclusion" the matter of the per diem payment, thereby ruling that the Arbitrator had the authority to make that decision (Exhibit E to the Complaint).

The Company then filed the present Complaint against the Union seeking a declaratory judgment[4] that (1) the portion of the Arbitrator's decision that Grand Coulee

4. The jurisdictional bases of the action were Section 301 of the National Labor Relations Act, as amended, 29 USC § 185 (1970), and the Declaratory Judgment Act, 28 USC § 2201 (1970).

satisfied the contractual requirements for a job headquarters was correct, and final and binding upon the Union; (2) the portion of the Arbitrator's decision that the parties should nevertheless negotiate over the question of a per diem payment was in excess of his authority and therefore void; and (3) the Union had no contractual right to process a "grievance" under Article I concerning the interpretation of the Arbitrator's decision. (R. 1-7)

The Complaint was filed on October 10, 1972. The Union's counsel filed a Notice of Appearance but no Answer. On November 1, 1972, the Company filed a Motion for Summary Judgment, together with a brief and affidavit of Richard C. Sweezey in support of the motion. (R. 7, 9 & 25) The hearing on this motion was set for November 24, 1972.

On November 21, 1972, the Union filed a Motion for Stay of Proceeding, two affidavits of John F. Lane, and a brief entitled as being in opposition to the Motion for Summary Judgment and in support of the Union's motion to stay, but limited, in its request for relief, to the Motion to Stay. (R. 34, 36, 37 & 55) With one exception not material here, the Union did not in any of these documents deny any of the facts contained in Mr. Sweezey's affidavit in support of the Motion for Summary Judgment, or in any other way raise a factual issue.

A hearing was held before the District Court as scheduled on November 24, 1972, at which both parties were represented by counsel. At the hearing, the Union made no contention that there were any facts in dispute or that the Company had somehow agreed to waive its right to have a judicial determination of this matter. The Union declined

to discuss the merits of the Company's motion, insisting only that the action be stayed. (Tr. 16, ll. 1-3; Tr. 17, ll. 14-18) The District Court, on the same day, entered its order granting the Motion for Summary Judgment. (R. 57)

On November 28, 1972, the Union moved for reconsideration, raising for the first time and without supporting affidavits an assertion that the Company had agreed to waive its right to judicial consideration of this matter. (R. 61) Nearly a month later, on December 21, 1972, the Union filed a third affidavit of John F. Lane allegedly creating a factual dispute with regard to the claim of a prior agreement between the parties. (R. 73) The District Court on December 21, 1972, denied the Union's Motion for Reconsideration. (R. 75)

The Court of Appeals (Judges Lumbard, Merrill and Wright) unanimously affirmed the judgment of the District Court and its denial of the Union's Motion for Reconsideration (App. A of Petition). Subsequently, the Court of Appeals denied the Union's Petition for Rehearing and refused to consider its suggestion for a rehearing en banc (App. A attached hereto).

ARGUMENT

The present case involves the interpretation of an arbitration decision applying the provisions of a single collective bargaining agreement to a few employees working on a specific construction project in a small town in Washington during the early summer of 1972. Other than for the parties, the case has no significance whatsoever to warrant review by this Court on certiorari. The decision of the Arbitrator considered a unique factual situation involving the

City of Grand Coulee at a particular point of time. He decided that the facts existing at that time allowed Grand Coulee to be a "job headquarters" for the work to be performed by the Company. The invalid portion of his decision directing the parties to negotiate the question of a per diem payment likewise was based on unique and isolated circumstances. In short, resolution of the present dispute has no application to other parties, contracts, locales or situations, or the state of the law generally. The Union, in its Petition, has not argued to the contrary. There is no conflict with other decisions and there is no important federal question necessitating review by this Court. The Union merely argues that the decisions of both courts below were in error.

The Union argues that summary judgment was improper, not only on the merits, but also because of an asserted factual dispute concerning a claimed agreement by the Company to waive its right to a judicial determination of the dispute. The Company will discuss these two issues separately.

I. There Was No Factual Dispute Precluding Summary Judgment

At the hearing on the Company's Motion for Summary Judgment, the Union declined to discuss the merits of the motion, relying solely on its Motion to Stay. Several days after summary judgment was granted, the Union raised for the first time a claim of a prior agreement on the part of the Company to forego its right to a judicial determination. This Motion for Reconsideration, however, was not accompanied by any supporting evidence and no explanation was offered then (or later) for the failure to raise this

issue in a timely manner. No supporting evidence was filed until nearly a month later. The District Court's denial of the Motion for Reconsideration was affirmed by the Court of Appeals in the following language:

> "After summary judgment was rendered the Union moved for reconsideration, contending for the first time that plaintiffs had waived any right to resort to court action on the dispute by having agreed to abide by the results of arbitration. The motion when made was without factual support. It was not until nearly a month after it had been filed that an affidavit was tendered in support. The District Court denied reconsideration. On the basis of this tardily tendered factual dispute, appellants now contend that summary judgment was premature. We disagree. The Motion for Reconsideration was directed to the Court's discretion. We do not regard rejection of the issue so tardily tendered as abuse." (App. A to Petition, p. A-2)

The Union contends that this action conflicts with the decisions from other Courts of Appeal. The Union, however, has been unable to cite any decision in conflict. None of the cases cited by the Union hold that an alleged factual dispute should render a summary judgment improper *ex post facto* when the factual dispute relates to an issue first raised after summary judgment was granted. More importantly, the Union has not cited any cases indicating that it was an abuse of discretion for the trial court to refuse to grant the Motion for Reconsideration and allow the injection of a new and unrelated issue following summary judgment. In fact, the reported cases are to the contrary and support the decision of the Court of Appeals that the trial court did not abuse its discretion in so ruling. *See DeBardeleben v. Cummings*, 453 F.2d 320, 324-25 (5th Cir. 1972); *Applegate v. Top Associates, Inc.*, 425

F.2d 92 (2d Cir. 1970); *Engelhard Industries, Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Proctor v. Sagamore Big Game Club*, 265 F.2d 196, 201 (3d Cir. 1959), *cert. denied*, 361 U.S. 831 (1959); *George P. Converse & Co. v. Polaroid Corp.*, 242 F.2d 116, 121 (1st Cir. 1957); *Bell v. Morgan*, 199 F.2d 168 (D.C. Cir. 1952).

The plain fact is that the alleged factual dispute has nothing to do with the issues before the Court below and the Union's argument was properly rejected by the Court of Appeals.

It should also be noted that the Union did not appeal from the denial of the Motion for Reconsideration. The Union has therefore lost whatever right it might have had to contest the denial of the Motion for Reconsideration. The Union has likewise lost its right to appeal from the granting of the summary judgment by declining to oppose it on the merits at the hearing before the District Court.[5] *See, e.g., Preferred Ins. Exch. v. Coshow*, 444 F.2d 362, 365 (9th Cir. 1971); *Westinghouse Elec. Corp. v. Weigel*, 426 F.2d 1356, 1357 (9th Cir. 1970).

II. The Decision Below Presents No Conflict or Important Question of Federal Law

The Union, in the second portion of its argument, at-

5. Moreover, the affidavit creating the alleged factual dispute was not filed with the Motion for Reconsideration as required by Federal Rule of Civil Procedure 6(b). The affidavit also was totally insufficient to create a genuine dispute of material fact under Rule 56(e) because on its face it included only evidence which would not have been admissible at trial. *See, e.g., United States v. Dibble*, 429 F.2d 598, 601-02 (9th Cir. 1970); *Turner v. Lundquist*, 377 F.2d 44, 47-48 (9th Cir. 1967). In short, then, the Union did not successfully create any material dispute of fact sufficient to justify denial of summary judgment even if the issue had been properly before the District Court.

tempts to make several different points. The Court of Appeals fully and adequately answered all of these arguments except the one made at pages 22-23 of the Petition to the effect that the Company waived its objection to the jurisdiction of the CIR since there is no evidence in the record that the Company made that objection before the CIR itself. This argument, however, was first made by the Union in its petition for rehearing to the Court of Appeals. This contention was never raised in the District Court nor in the Court of Appeals prior to its decision. For this reason alone, it should not be considered now.

With regard to the remaining arguments, the Union has totally failed to show that the decision of the Court of Appeals in any way conflicts with other decisions, either with regard to the particular facts or in principle. The Union has not even claimed that any important federal question is involved in the present case. What is involved is solely a dispute between the Union and the Company involving some 22 employees under the specific terms of a particular collective bargaining agreement and the particular facts involving the condition of the housing at Grand Coulee at a particular point in time in the past. Certiorari is not appropriate to "review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). There is simply no question involved in this case warranting review by this Court. This Court does not "sit for the benefit of particular litigants" or to review questions that are "academic" or "episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). As in the *Rice* case, the present case is one of "isolated significance." *Id.* at 76.

On the merits, the Court of Appeals was correct. The Agreement contemplates that the function of the Arbitrator under Article V of the Agreement is a very limited one—*i.e.*, to determine whether a particular location satisfied the contractual requirements of a "job headquarters." His decision on this issue is expressly agreed to be "final and binding." The decision of the Arbitrator (App. B hereto) reveals beyond question that he did decide that Grand Coulee satisfied the contractual definition if not more than 22 Union workmen were assigned by the Company, and both the District Court and the Court of Appeals agreed. The Arbitrator's error, reversed by both the District Court and the Court of Appeals, was venturing beyond this question—and his jurisdiction—by purporting to direct the parties to do something else.

In reversing this portion of the Arbitrator's decision, the Court of Appeals was merely applying well established and accepted legal principles.

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). *Cf., General Drivers Local 89 v. Riss & Co.*, 372 U.S. 517, 520 (1963).

It is not unheard of for an arbitrator to exceed his authority in the manner involved in the present case. A nearly identical situation was presented in *Local 791, International Union of Electrical Workers v. Magnavox Co.*, 286 F.2d

465 (6th Cir. 1961), where the court reached the same result reached by the Court of Appeals in the present case.

While the Union argues that the Court of Appeals erred in ruling that the Union had no right to seek a decision from the CIR concerning the interpretation of the Arbitrator's decision, the Union does not present this issue as a question presented for review, as required by Rule 23(1)(c), and it should not be further considered. See cases cited *supra*, p. 3, fn. 1. On the merits of this issue, the following points can be made.

This is not a case (such as those cited by the Union) in which the Company is seeking judicial relief for a violation of the Agreement when that claim should initially be submitted to the grievance procedure. Rather, the Company challenged the Union's right to resort to the grievance procedure, a situation expressly allowed by all decided precedent.

> "A compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964).

See, e.g., El Paso Bldg. & Constr. Trades Council v. El Paso Chapter, Assoc. Gen. Contractors, 376 F.2d 797 (5th Cir. 1967); *Philadelphia Marine Trade Ass'n. v. International Longshoremen's Ass'n., Local 1291*, 365 F.2d 295 (3d Cir. 1966), *rev'd. on other grounds*, 389 U.S. 64 (1967); *Black-Clawson Co. v. International Ass'n. of Ma-*

chinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).[6]

On the merits of the Union's argument concerning the jurisdiction of the CIR, the Court of Appeals was clearly correct that any dispute over the interpretation of the Arbitrator's decision under Article V was not subject to resolution under the grievance procedure of Article I of the Agreement.

> "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

The Union can point to no provision of the Agreement which, under any stretch of imagination, supports its argument that a decision of the Arbitrator under Article V becomes a "term" of the Agreement about which there can be a dispute over its "interpretation or application" to come within the Article I grievance procedure.

> "It would be an abdication of our responsibility to hold that merely by phrasing a grievance as a request for interpretation of the contract, the union foreclosed the court from considering whether the employer agreed to submit the issue to arbitration." *Camden Industries Co. v. Carpenters Local 1688*, 353 F.2d 178, 179 (1st Cir. 1965) (citation omitted).

If the parties had intended that a dispute concerning an Article V arbitration decision could be reviewed by the CIR (to say nothing of the Union's assertion that the CIR could issue any decision it wished in complete disregard

6. It should also be noted that the CIR upheld the Arbitrator's direction to the parties to negotiate and therefore did issue a "final" decision on that matter. The Union admitted as much in its opening brief to the Court of Appeals at page 4: "the CIR had ruled that the arbitrator's direction to the parties, whereby they were to negotiate relative to the 'daily stipend,' was valid . . . ."

of the Arbitrator's Article V decision) then there manifestly would have been no reason for the parties to agree that the Article V arbitration decision would be "final and binding." In short, the Article V arbitration procedure is totally separate and independent of the Article I grievance procedure and the Union had no contractual right to seek CIR review of the Arbitrator's decision.

In effect, the Union is attempting to avoid the Arbitrator's decision and relitigate the job headquarters issue. The Union is attempting to get through the grievance mechanism what it did not get through the Article V arbitration: an award of per diem. The Arbitrator has already issued a "final and binding" decision that Grand Coulee was a proper job headquarters. Section 5.5(b) unambiguously provides that "workmen shall receive no reimbursement for travel time when working out of a job headquarters." The Union cannot relitigate this issue.

> "What the plaintiff is attempting to do in this action is to impeach the award of the arbitrator which was entered in accordance with the collective bargaining agreement." *Chambers v. Beaunit Corp.*, 404 F.2d 128, 132 (6th Cir. 1968).

Two courts have already reviewed and rejected the Union's argument. A third review is not called for.

The Union's argument concerning the "legislative" authority of the CIR and the Fourth Circuit case of *Parks v. International Brotherhood of Electrical Workers*, 314 F.2d 886 (4th Cir. 1963), *cert. denied*, 372 U.S. 976 (1963), involving an intra-union dispute, are totally beside the point. The simple fact is that both the District Court and the Court of Appeals found that under the provisions of the particular collective bargaining agreement involved in this

case, the CIR did not have jurisdiction to review an Article V arbitration award. Nothing stated in the *Parks* case or contained in the Union's argument casts any doubt on the correctness of these findings.

In short, the Court of Appeals correctly applied existing precedent to the particular facts involved in the case—an arbitration decision applying a specific collective bargaining agreement to a unique setting. These facts will never reoccur. The decision below does not conflict in any way with other decisions and does not involve any important issue of law which would justify review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATE COURT OF APPEALS
FO' THE NINTH CIRCUIT

CITY ELECTRIC, INC., etc., *Appellee,* v. LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Appellant.*	No. 73-1270 ORDER

Before: LUMBARD, MERRILL and WRIGHT, Circuit Judges

Appellant's petition for rehearing herein is denied.

We decline to consider the suggestion of rehearing en banc for failure of the petition to comply with the provisions of Rule 12 of the rules of this court.

[Filed July 10, 1975]

APPENDIX B

GRAND COULEE ARBITRATION:

City Manson Osberg, Contractors, vs. Local #77, International Brotherhood of Electrical Workers Union

Issue: Grand Coulee, Washington being allowed as Job Headquarters for Grand Coulee 500 KV Switchyard, Cable Spreading Yard and Transformer Circuits, Stage 01 Project

Representing Local Union #77, I.B.E.W., John F. Lane, W. R. Johnson

Representing City Manson Osberg, Dick Swazy [*sic*] and Dale O. Johnson

Arbitrator: The Reverend Dr. W. J. McGettigan

Date of Hearing: May 19, 1972

Mr. Dale O. Johnson presented the argument for the company, stating that their written presentation pointed out the two main issues:

First, that the company's office at the job site met the requirements of a permanent headquarters as set forth in the Agreement (Article III, Section 3.9);

Second, that according to the survey made on May 18th there are sufficient lodging facilities available in Coulee Dam and within a 5-mile radius (see Section 5.3) to allow the designation of Grand Coulee as Job Headquarters for this project.

These two issues were reviewed and discussed:

1) The establishment of Grand Coulee as Permanent Headquarters by the contractors; and

2) The establishment of Grand Coulee as Job Headquarters for the "Grand Coulee 500 KV Switchyard."

The contractor's representatives claimed that the contractor had fulfilled all requirements of establishing Grand Coulee as permanent headquarters; and that they, as con-

tractors, meet the requirements of Section 3.9, they had the right to expect the union to observe the Agreement (Section 5.5(a): "Workmen shall receive no allowance for either board and lodging or travel time when working out of the Contractor's Permanent Headquarters.").

Mr. Dick [*Sic*—Dale] Johnson suggested that it was a "basic concept of I.B.E.W. for the man to report where the work is" . . . "that I.B.E.W. will provide men to the contractor at his place of work." . . . and that City Manson Osberg has established Grand Coulee as its place of work—therefore the union should live up to the Agreement.

Union representatives, Mr. John F. Lane and Mr. W. R. Johnson, challenged the assertion that the "trailers on the job site" constituted neither by definition, nor by the intent of the Agreement, nor by past practices, sufficient grounds for accepting the claim that the company could claim the job site as "permanent headquarters." It was also asserted that the establishment of an office at the job site by a combination of contractors had not in the past been acceptable as a "permanent headquarters," and as this was a similar case, this claim could not be accepted by the union.

The second discussion involved the question regarding the principle of a community as "Job Headquarters." The question was asked whether a community could be established as a Job Headquarters in one case for a small crew while it might be found unacceptable for a larger crew.

The contractor insisted that the Agreement, when strictly interpreted, should permit this.

The union pointed out the inequity such an interpretation would create. The situation could exist in which one crew would not be receiving travel pay, whereas another crew would be. It was asserted by the union that if a community was not acceptable for one job it could not be found acceptable for another job unless there was a "big drop" in employment in the area or a "big boost in housing" . . . whereas the contractor's representatives contended that the Agreement clearly is on an individual job basis, "Your Agreement merely provides for your men working on a particular job."

During the discussion it was pointed out that it made a great difference when the survey was made, time of day, and day of week. It was also asserted by the contractor's side that the entire question of the "number of housing units available at any time is immaterial as long as the contractor agrees not to call up a man until there is a room available and reserved for him (that 'the contractor guarantees he will have accommodations for the men before he calls for them')."

Following a statement by the arbitrator of the issues and presenting the interpretation of Section 5.3 as applied to previous decisions, the meeting recessed for a short period of time to provide the parties involved an opportunity for further negotiation. It was stated that the issue to be decided was the one presented at the Labor-Management Committee meeting of May 17, 1972, "whether Grand Coulee could be allowed as Job Headquarters for the Bureau of Reclamation 500 KV Switchyard, Cable Spreading yard and Transformer Circuits, Stage 01 Project for the total number of men as designated by the contractor."

Following a recess in which the parties did not come to any agreement, the figure for the number of men to report to this Job Headquarters for this project was established by the contractor as 22 men.

The meeting adjourned, and the arbitrator surveyed the communities of Grand Coulee, Coulee Dam and Electric City, and found as folows:

REPORT OF SURVEY OF MOTELS

Center Lodge 0	One (1) available—none available on Monday; One available because renter moved out Friday. Rate: $8.50 per night for single; $30.00 weekly.
Charlan Motel 4	Four (4) are kept for nightly rental—one apartment type that will accommodate 3 men. Rate: $18.00 per night (could take care of 3 men if they would be regular renters.)

B-4

Coulee Center Hotel	Five (5) units available, none with bath or showers One (1) unit with two beds Rate: $7.50 or $25.00 weekly
Coulee House 13 Friday 9 Monday	Of the 47 units proprietor promised that 13 would be available for rental at $9.00 per night for regular renters, double units would be rented for singles if no other demands but could not be reserved on a single basis. (Surveyed by phone Monday, May 22nd.) Rate: $9.00 per night.
Four Winds	(Rooming house) One (1) unit with bath at $10.50 daily; Tourist room at $32.00 weekly. Single units having no bath or shower at $7.00 nightly and $23.00 weekly ("working men's rooms").
Green Hut	Four (4) (sleeping rooms) units available when surveyed. Nine (9) sleeping rooms at $16.50 weekly, $66.00 monthly (room only). Three (3) apartments: two (2) at $125.00 monthly. one (1) at $135.00 monthly. (Only one was available at time of survey.)
Lee Motel	No one home . . . survey of May 18th . . . none available.
Sky Deck 4	Four (4) singles available, none with kitchens. (These are reserved during the summer for tourist trade.) Rate: When reserved for work week, $5.00 nightly. $6.00 for one night. Doubles: $7.00 daily; $35.00 weekly without kitchen $40.00 with kitchen.
Umbrella 7	Surveyed by phone Monday, May 22. Seven (7) singles available.
Wild Life Hotel	Single, $4.50 to $8.00–$4.50 without bath, $8.00 with bath. One (1) without bath available.
Trail West (Save-a-Dollar)	None available.

Ponderosa — This is a new motel in Coulee Dam and will be finished soon. Owner said that in the offseason he would rent facilities at the same rate as Coulee House.

Rate: single (winter) $9.00 nightly.

ARBITRATOR'S REVIEW OF ISSUES AND QUESTIONS

The survey reports as presented at the hearing and made by the arbitrator illustrate one of the difficulties of using Grand Coulee, Coulee City and Electric City as Job Headquarters.

The company survey showed 93 units available as surveyed May 18th. The union survey dated May 11th indicated that there were 26 facilities available. The total units that could be rented in the area according to the company listing is 231. This includes all units available; singles, doubles, rooms and apartments.

Yet, as not standard of housing facilities has been established by the parties to the Agreement, there is no basis for a meaningful count or evaluation of facilities. (The arbitrator included only single units with bath, $9.00 or under per night.)

Another example of the problem is illustrated by the Center Lodge surveys: The May 18th survey showed seven (7) available; the union survey reported "do not want construction men"; and the arbitrator's information was that there was one (1) unit available (which had become available the night before and which would be filled on Monday).

Still another example of the problems is illustrated by the statements made regarding Coulee House: The company survey showed twenty (20) available; the union survey had no report; the arbitrator found 13 available Friday afternoon and only nine (9) on Monday morning (when surveyed by phone). Coulee House promised to keep rooms available during the summer for workmen at commercial rates ($9.00 for a single night) when reservations were made for weekly use.

A fourth example is the Umbrella which, according to the contractor's survey had twenty-eight (28) available; by the union's account only six (6); and by the arbitrator's survey (by phone Monday) had seven (7).

As was pointed out in the contractor-union arguments, the issue centers about the interpretation of Section 5.3 of the Agreement. On the one hand, it is interpreted as saying, or intending to mean, there be suitable rooms *for the men seeking* a place to stay ("to live and eat")—while on the other, it is claimed that for a community to be accepted as Job Headquarters there must be sufficient rooms *for all men reporting to the job.* In other words: (1) All men wanting a room—or (2) a number of available rooms equal to the number of men reporting to the job.

Another question of the Agreement was raised in a different way.

1. Does it refer:
   a) to the immediate situation at the time of a man's "arriving on the job"—
   b) or is it primarily concerned about the total period of time he will be employed on the particular project?
2. Does it involve:
   a) the total number of men working on the total project—
   b) or only the men covered by the union involved?

Another question asked again in this hearing as it has been in previous hearings is:

> Does the commitment on the part of the contractor to find lodging for any man ordered to report satisfy the requirements of Section 5.3?

ARBITRATOR'S DECISION

The issue enjoined regarding Grand Coulee as Job Headquarters for the Grand Coulee 500 KV Switchyard, Cable

Spreading Yard and Transformer Circuits, Stage 01 Project was presented in two parts.

The first, while never a formal issue, was raised during the Labor-Management Committee meeting of May 17th and during the hearing at Coulee Dam May 19th, namely: The contractor's contention that Grand Coulee was in actuality the Permanent Headquarters of City Manson Osberg.

The second issue was whether Grand Coulee met the requirements of a Job Headquarters as set forth in the Agreement (Section 5.3).

In the prepared statement presented by the contractor it is stated (page 4):

> "This organization's permanent headquarters is at the job site and meets all the requirements set forth in paragraph 3.9. Pursuant to paragraph 5.5(a):
>
> > 'Workmen shall receive no allowance for either board or lodging or travel time when working out of the Contractor's Permanent Headquarters.'"

As the Labor-Management discussion pointed out, this presents an interesting situation. The arguments of the contractor's representatives at the hearing that the Permanent Headquarters is located at Grand Coulee must be taken into consideration even though it is a secondary issue.

FIRST:

It is the arbitrator's opinion that it cannot be accepted in this case that Grand Coulee is the Permanent Headquarters of the City Manson Osberg in the generally accepted interpretation.

1) The company existed prior to the awarding of the bid and at that time had a mailing address which is still the address of the company: 3700 Rainier Avenue South, Seattle, Washington, 98144.

2) To accept the action of the company following the bidding and the awarding of the bid in establishing its working headquarters at Grand Coulee thus permitting it to come under the ruling set

forth in Section 5.5(a) is contrary to past practices in the industry and runs counter to the apparent facts and would threaten the foundation upon which the Agreement rests.

SECOND:

As has been pointed out in previous hearings, each hearing is a separate issue; and while past practices and "common law of the shop" must be taken into consideration in each decision, the decision rests upon the particular situation and issues under consideration.

As the contractor contended in the hearing, each decision must be based upon the facts of that particular situation.

Each decision must be based upon the merits of that particular issue—in this case, whether Grand Coulee can be found acceptable for the men reporting to Grand Coulee 500 KV Switchyard Project.

As has been pointed out and underscored in previous hearings, two asumptions are the basis of the decisions made regarding suitability of lodgings:

1) The number of men reporting to the project is the basis upon which the community is evaluated. Not the number who will be seeking housing in that particular community, but the total number of men reporting to the job—in this case a maximum of 22 men.

2) The lodgings available must meet the needs of those who will be seeking them. The desires of the men are the basic criteria. They must have adequate choices. It is not enough that the company can make reservations for a man who is called to report to that community, but that that man has a choice of facility that fits into his social and economic needs and desires.

The decision made is based upon the question: Does Grand Coulee provide within a 5-mile radius sufficient adequate and suitable lodgings for the number of men reporting to this project? This number has been set at 22.

This does not mean that a maximum of 22 men employed on the project can be called to report to Job Headquarters and others called to report at other places—but that the number of men reporting to this project, for which Grand Coulee provides suitable and adequate lodgings is 22. If more than 22 men are employed on this project, then the decision rendered is no longer applicable.

> (This does not mean more than 22 individuals, but job-position employees. *Example:* If a man is working on a particular job and leaves the company employment and another man is hired to continue that particular job, that is still only one man as counted in this decision. But if another man is added to complete the job sooner—or for some other reason—that would count as an additional workman.)

It is the opinion of the arbitrator that—viewing the particular situation as presented by City Manson Osberg and Union #77, I.B.E.W. regarding the requirements of the Grand Coulee 500 KV Switchyard Project and the findings of the survey made by the arbitrator—that Grand Coulee can be accepted as Job Headquarters for this project to which a total of 22 men shall report.

It is also the opinion of the arbitrator that, in keeping with common practice and past experience (not "past practices" or "established practices") which should have been known by City Manson Osberg at the time of estimating and bidding on this project, the contractor and the union shall seek to negotiate the matter of an additional amount of daily stipend to the workmen employed on this particular project. As the United States Supreme Court pointed out in a 1960 decision, the arbitrator's decision is not limited only to the wording of the contract but must take into consideration "such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."

While the arbitrator cannot accept—as stated in a previous hearing on Grand Coulee—that $10.00 is an established amount to be paid men who are required to report to Grand Coulee as Job Headquarters, it is his opinion that the fact that men in the same industry, working on

similar jobs and under the jurisdiction of the same union as those employed by City Manson Osberg for this project, are receiving an additional sum creates a situation that requires the attention of the parties involved and which demands consideration. This matter is referred to City Manson Osberg and Union #77, I.B.E.W. for negotiation.

Respectfully submitted:

/s/ W. J. McGettigan

W. J. McGettigan